IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 79

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 695, A.F.L.; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, A.F.L.; and BUILDING & CONSTRUCTION LABORERS UNION, LOCAL 392, A.F.L.,

Petitioners,

v.

VOGT, INC.,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR RESPONDENT

LEON B. LAMFROM,
208 E. Wisconsin Avenue,
Milwaukee 2, Wisconsin,
Counsel for Respondent.

LAMFROM & PECK,
JACOB L. BERNHEIM,
208 E. Wisconsin Avenue,
Milwaukee 2, Wisconsin,

HILBERT W. DAHMS,
Oconomowoc, Wisconsin,
Of Counsel.

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OPINIONS BELOW

The memorandum opinion of the Circuit Court for Waukesha County, Wisconsin, (R. 1-2) is unreported. The opinions of the Supreme Court of Wisconsin (R. 22-28 and R. 30-46) are reported at 270 Wis. 315, 71 N.W. 2d 359, and at 270 Wis. 321a, 74 N.W. 2d 749.

JURISDICTION

The Supreme Court of Wisconsin, on June 28, 1955, entered a mandate reversing the judgment of the Circuit Court for Waukesha County (R. 28). A timely motion for rehearing was filed by the Respondent herein, on July 18, 1955 (R. 28) and was granted on October 5, 1955 (R. 29). After reargument heard on January 12, 1956 (R. 29), the Wisconsin Supreme Court, on February 7, 1956, withdrew its original mandate and substituted a new mandate affirming the judgment of the Circuit Court (R. 41). A petition for certiorari was filed on May 4, 1956, and was granted on October 8, 1956 (R. 47). The jurisdiction of this Court rests on 28 U.S.C., § 1257(3).

QUESTION PRESENTED

Whether peaceful picketing at a place of business (Respondent's gravel pit) located on a country road is protected by the First and Fourteenth Amendments to the Constitution of the United States, where such picketing was found to have been undertaken for the unlawful purpose of coercing or inducing the employer to pressure or coerce its employees to join the picketing unions, in violation of Section 111.06(2)(b) of the Wisconsin Statutes (1953).

STATUTES INVOLVED

The pertinent provisions of Chapter 111 of the Wisconsin Statutes (1953), including Section 111.06(2)(b), are printed in the Appendix, *infra*, p. 57ff.

STATEMENT

Respondent, Vogt, Inc., operates a gravel pit in the Town of Oconomowoc, Waukesha County, State of Wisconsin, and there engages in the business of producing and selling washed sand and gravel and ready-mixed concrete. Its place of business is located on a country road not frequented by the general public (R. 3, 16).

Petitioners (hereinafter referred to as the "Unions"), from approximately August 1953 and through Spring and Summer of 1954, unsuccessfully solicited Vogt's employees, fifteen to twenty in number (R. 5), for membership in their organizations, and these employees not only did not become members of such Unions, but indicated that they did not desire to join (R. 5, 8-11, 16), and have steadfastly maintained that position (R. 16).

On July 13, 1954, the Unions commenced to picket Vogt's gravel pit, carrying signs reading as follows: "The men on this job are not 100% affiliated with the A.F.L." As a result, Vogt was deprived of the services of the several trucking companies who had been hauling goods and materials to and from its place of business, since their drivers refused to cross the picket line (R. 16). This caused Vogt to suffer substantial and irreparable damage, since its business was largely dependent upon truck transportation (R. 16, 17). No labor dispute or controversy of any kind existed between Vogt and its employees or between Vogt and the Unions (R. 16, 17). The parties stipulated that the present record contains all of the facts which *would* be adduced upon a trial on the merits (R. 20).

Vogt filed a complaint in the Circuit Court for Waukesha County, Wisconsin, alleging that the picketing was conducted for the purpose of coercing it to compel its

employees to join the unions, in violation of Sec. 111.06 (2)(b), Wis. Stats. (1953) (R. 5-6) and, further, that the picketing was in violation of Sec. 103.535, Wis. Stats., (1953), since no labor dispute as defined in Sec. 103.62 (3), Wis. Stats. (1953) existed (R. 6),[1] and prayed for injunctive relief. The trial court, on November 9, 1954, issued a permanent injunction (R. 18-19) restraining the picketing (which had been continuous until temporarily restrained upon commencement of the action), on the ground that such picketing was not permissible, since no labor dispute, as defined in Secs. 103.535 and 103.62(3) existed. That court found that the purpose of the picketing was to induce Vogt's employees to organize and affiliate with the Unions (R. 16), and did not adopt the finding, requested by Vogt, that the purpose of the picketing was to coerce or induce the employer to pressure or induce its employees to join the Unions (R. 25, 35).

On appeal, the Supreme Court of Wisconsin, in its first opinion, issued on June 28, 1955, reversed the Circuit Court, relying primarily upon *A.F.L. v. Swing*, 312 U.S. 321, as affecting the validity of Sec. 103.535, Wis. Stats. (1953),[2] (R. 21, 22-28). Subsequently, the Court below granted a motion for rehearing and ordered a reargument of the case (R. 29).

On February 7, 1956, the Wisconsin Supreme Court withdrew its original opinion and substituted (one Justice dissenting) a new opinion and mandate affirming the judgment of the Circuit Court (R. 29-30, 41). In its

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[1]These statutory provisions are quoted *infra*, p. 36, Note 40.

[2]See Note 1, above. Cf., *City of Waukesha v. Plumbers Local No. 75*, 270 Wis. 322, 71 N.W. 2d 416, decided on the same day, discussed *infra*, p. 37, Note 42.

second opinion the Court found[3] that, under the facts disclosed by the record, the picketing had been engaged in for the purpose of coercing or inducing Vogt to pressure or coerce its employees to join the Unions (R. 35, 37, 41), a purpose made unlawful by Sections 111.04 and 111.06 (2) (b), Wis. Stats. (1953) [Appendix, *infra*, p. 58, 59], (R. 26, 41), which guarantee employees the right of self-organization (including the right to refrain from joining a union), free from pressures or coercion from *any* source. It held, therefore, under this Court's decision in *Building Service Employees v. Gazzam*, 339 U.S. 532, that the injunction did not violate the free speech provisions of the Federal Constitution (R. 34-35, 41). The Court below also stated its decision was not to be construed as approving restraint of peaceful picketing "solely because the is no immediate employer-employee dispute as was held in the *Swing* case." (R. 41).

[3]Petitioners, in their statement (Pet. Br. 5-6), present an incomplete and, in form, somewhat sarcastic explanation of the reasoning of the Wisconsin Court in arriving at the decision and judgment which is here under review. That reasoning, the basis for its judgment, is stated clearly and succinctly in the second opinion of the Wisconsin Court. (R. 30-1, and R. 35-6).

SUMMARY OF ARGUMENT

I. The public policy of Wisconsin guarantees workers the right to self-organization, the right to form, join or assist labor unions, to engage in concerted activities for mutual aid and protection and, also, the *right to refrain* from any and all such activities — free of interference *from any source*. Further, the Wisconsin Act makes unlawful the coercion of employers to interfere with these rights, as well as the intimidation of employees. Nevertheless, Petitioners here engaged in picketing, solely, in order to coerce the employer to intimidate its employees into joining the unions in violation of this State policy. Picketing is the signal to union members and their sympathizers not to cross the picket line and thus inflicts coercive economic pressure on the picketed employer. *Hughes v. Superior Court*, 339 U.S. 460, 464-5; *Teamsters Union v. Hanke*, 339 U.S. 470, 474. Because of its foreseeably coercive effects, confirming its purpose, a claim that the picketing was conducted solely for peaceful persuasion of employees is unreal — "peaceful persuasion" terminated when the picketing commenced. Under all of the facts and circumstances (including the employees' persistence in refusing to join the unions) and the natural inferences flowing therefrom, the picketing clearly was undertaken for an unlawful purpose. Anomalously, if the picketing were held not to be subject to restraint, the employer could be forced to go out of business whenever its employees elected to exercise their statutory right not to join a union or, else, would have to violate the law. *Building Service Employees v. Gazzam*, 339 U.S. 532, 540.

II. The findings of the Wisconsin Supreme Court are based upon substantial factual foundations. Because they

do not represent a disregard of constitutional mandates, and are certainly not "spurious," there is no warrant to re-examine these findings. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160; *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293. This Court has always held that the reasoning and conclusions of the State supreme courts are given a "weighty title of respect." *Teamsters Union v. Hanke, supra*, at 475.

III. A. Notwithstanding the broad language in *Thornhill v. Alabama*, 310 U.S. 88, peaceful picketing cannot inevitably be equated with constitutionally protected free speech; it is more than that and is, in fact, coercion. But peaceful picketing involving "coercion or conduct otherwise unlawful or oppressive," i.e., undertaken for an unlawful object, may be restrained, *Teamsters Union v. Hanke*, 339 U.S. 470, 474; *Building Service Employees Union v. Gazzam*, 339 U.S. 532, 536-7, and it was such a purpose, violative of Wisconsin law, and not the absence of an employer-employee dispute, which removed the picketing here from Constitutional protection. Not *A.F.L. v. Swing*, 312 U.S. 321 and *Baker Drivers Local v. Wohl*, 315 U.S. 769, but *Building Service Employees v. Gazzam*, supra, is controlling. Moreover, the right to engage in a lawful business, free from outside interference, is also guaranteed by the Constitution. *Carpenters & Joiners v. Ritter's Cafe*, 315 U.S. 722, 725; *Truax v. Corrigan*, 257 U.S. 312, 327, 331-2. In exercising their rights, labor unions must give due regard to the equally important rights of others.

B. Contemporary conditions and circumstances relating to industrial disputes must be taken into account in deciding the issues here in question. *Teamsters Union v. Hanke*, 339 U.S. 470, 479-80. Labor unions no longer

are weak, helpless and impotent, but have grown into a powerful national economic force which fact has gained national public recognition. In addition, Wisconsin, as part of its social and economic policy, has enacted a comprehensive labor code, substituting judicial and administrative processes for militant methods of industrial warfare, — the ballot box was to replace coercive picketing and boycott for legitimate organizing efforts.

C. In view of these changed circumstances, this Court must reexamine the "constitutional boundary line between competing interests" in industrial society. Cf., *Hughes v. Superior Court*, 339 U.S. 460, 466. A review of the constitutional issues herein necessarily involves a consideration of the legitimate rights, not only of labor unions, but also of employers, employees and of the public. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 496. A "little" employer, like Respondent, is also entitled to, and requires, the protection of the law against the illegal destructive economic harm engendered by industrial warfare. The Wisconsin statute affords such protection to all and guarantees workers full freedom of self-organization and association without interference. Such a statute, as construed by the Court below, does not offend the Constitution.

ARGUMENT

I.

THE FINDING OF THE WISCONSIN SUPREME COURT THAT THE PICKETING WAS UNDERTAKEN FOR AN UNLAWFUL PURPOSE IS MANIFESTLY CORRECT AND THE ONLY ONE POSSIBLE UNDER THE EVIDENCE AND THE NATURAL INFERENCES DEDUCIBLE THEREFROM

A. The Public Policy of Wisconsin Guarantees Workingmen Full Freedom of Association and of Self-organization, Including the Right to Refrain from Joining a Labor Organization.

In furtherance of its social and economic policies,[4] and for the purpose of promoting industrial peace in the interests of the public, employees and employers alike, Wisconsin has enacted a comprehensive labor relations act, Ch. 111, Wis. Stats. (1953),[5] the Employment Peace Act (hereinafter referred to as the "Act"). The pertinent provisions of such Act are set forth in the Appendix, *infra*, p. 57ff. By Sections 111.01 (3) and 111.04, the Act establishes the cardinal principle[6] that employees shall be free to associate with or join labor organizations and, in addition, that they shall also be free to *refrain* from such associations.[7] In order to safeguard these rights of self-organization granted to workingmen, the Act

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[4]Cf., *Teamsters Union v. Hanke*, 339 U.S. 470, 474-5.

[5]Created by Ch. 57, Wis. Laws, 1939.

[6]App., *infra*, p. 58.

[7]A similar policy is embodied in Section 7 of the National Labor Relations Act, as amended in 1947, 29 U.S.C.A., Sec. 157.

makes unlawful, in Sec. 111.06, certain activities and declares them to be "unfair labor practices."[*]

1. The Activities Prohibited by Section 111.06(2)(b).

As related to the facts and activities involved in this case, Respondent alleged in its Complaint (R. 6), and the Wisconsin Supreme Court found (R. 35-37, 41), that Petitioners, by their picketing activities, had violated Sec. 111.06(2)(b) of the Act in that such picketing had been undertaken for the purpose of intimidating Respondent to coerce its employees to join petitioner unions or to designate them as their bargaining representatives. Subsec. (2)(b) of Sec. 111.06, Wis. Stats., reads as follows:

> "(2) It shall be an unfair labor practice for an employee individually or in concert with others:
>
> * * *
>
> "(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative."

This subsection thus makes it unlawful for an employee or a labor organization

> (1) to coerce, intimidate or induce an employer to interfere with the rights of his employees, including those guaranteed by Sec. 111.04,

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[*]Relief against the commission of such unfair labor practices may be had before the Wisconsin Employment Relations Board as well as by the pursuit of legal or equitable relief in the courts. Sec. 111.07(1), Wis. Stats. (1953) (App., *infra*, p. 59).

or

> (2) to coerce, intimidate or induce an employer to engage in any practice in regard to his employees which would constitute an unfair labor practice if engaged in by the employer on his own initiative.

The first of these prohibitions involves the legal rights of the employees, including those guaranteed in Sec. 111.04. That section grants employees the right to self-organization, including the right to select their own bargaining representative, but also gives them "the right to refrain from any or all of such activities."

The second of these prohibitions forbids a labor organization to coerce, intimidate or induce an employer to commit any of the acts banned by subsection (1) of Sec. 111.06 (App. *infra*, p. 58). Among the thus proscribed activities, relevant to the facts in this case, are the following:

> Interference with the rights of the employees [§ 111.06(1)(a)],
>
> Encouraging or discouraging membership in any labor organization [§ 111.06(1)(c)], and
>
> Bargaining collectively with representatives of less than a majority of one's employees [§ 111.06(1)(e)].

Stated another way, the question really is whether the facts disclosed by the record, and the permissible inferences, can support the finding that Petitioner's acts tended to coerce, intimidate or induce Respondent not only to interfere with its employees' rights protected by Sec. 111.04, but also to engage in any of the practices forbidden to the employer by subsection (1) of Sec. 111.06.

B. The Facts and Natural Inferences, in their Totality, Demonstrate a Clear Violation of Sec. 111.06(2)(b).

1. The Picketing was not Engaged in Merely for the Dissemination of Information, or for Persuasion, but for the Purpose of Coercing the Employer.

Only recently Mr. Justice DOUGLAS had occasion to point out that

> "Picketing is more than speech; it is physical conduct on streets or at factory doors. Like a procession or a parade, it presents special problems which speech, and speech alone, does not involve."[10]

Indeed, the very term "picket" denotes a militant purpose which is inconsistent with peaceful persuasion, *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 205, 207, and it necessarily embraces elements of intimidation. Although it is sometimes contended that *Thornhill v. Alabama*, 310 U.S. 88, in 1940, put picketing on a par with speech and placed all such activity under the protection of the First and Fourteenth Amendments, subsequent decisions of this Court have dispelled any such notions and have made it abundantly clear that picketing is more than speech and that, though it may have ingredients of communication, "it cannot dogmatically be equated with constitutionally protected freedom of speech." *Teamsters Union v. Hanke*, 339 U.S. 470, 474. This is so because the picket line exerts influences and produces consequences unlike other modes of communication, such as publications in a news-

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[9]Douglas, *We, the Judges*, p. 318 n. 4 (1956).

[10]Compare *Cox v. New Hampshire*, 312 U.S. 569.

paper or in circulars. See *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 776-7 (concurring opinion); *Hughes v. Superior Court*, 339 U.S. 460, 464-5; *Building Service Employees v. Gazzam*, 339 U.S. 532, 537; *Thomas v. Collins*, 323 U.S. 516, 543-4 (concurring opinion).[11]

Whenever a union resorts to picketing, it nearly always represents a deliberate decision by it to inflict economic harm on the employer picketed. Picketing, whatever its motive in a particular case, "is generally a labor activity carried on in furtherance of a plan to impede the picketed person's opportunity to enjoy a free and open market."[12] Cf., *Capital Service, Inc. v. N.L.R.B.* (C.A. 9), 204 F. 2d 848, 852-3, and Note d.

Respondent alleged in its Complaint (R. 6) that Petitioners, by their conduct, had violated Sec. 111.06(2)(b), Wis. Stats. (1953), in that the picketing had been engaged in for the purpose of coercing, intimidating and inducing the employer to force, compel or induce its employees to become members of the unions (R. 5-6).

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[11]Many legal writers have come to the conclusion, after extensive analysis of the various aspects involved, that picketing cannot at all be equated with free speech, but amounts to coercion of the target picketed. Gregory, "Picketing and Coercion: a Defense," 39 *Va. L. Rev.* 1053 (1953); Teller, "Picketing and Free Speech," 56 *Harv. L. Rev.* 189, 201 (1942).

Others have criticized the view, then thought to be expressed in the *Thornhill* case and in *Carlson v. California*, 310 U.S. 106, that picketing, with few exceptions, was to be equated with constitutionally protected free speech. Teller, *supra*, at 202-3; Corwin, Book Review, 56 *Harv. L. Rev.* 484, 486 ("In many instances, picketing, even when unaccompanied by actual violence or fraud, is coercive and intended so to be; and when it is, it is related to freedom of speech to about the same extent and in the same sense as the right to tote a gun is related to the right to move from place to place."); Gregory, *Labor and the Law*, 349 (Rev. Ed., 1949).

[12]Teller, *supra*, Note 11, at 202; Petro, "Recognition and Organizational Picketing," 3 *Lab. L. J.* 819, 820 (1952).

Although the trial court refused to make such a finding (R. 25, 35), but held that the purpose of the picketing "was to induce the employees to organize and affiliate with defendants" (R. 1), the Wisconsin Supreme Court, in its second opinion, did so find, as initially alleged by Respondent (R. 35, 37, 41). That such finding of the Wisconsin Supreme Court is indubitably right, and the only one possible, will be easily apparent upon a closer examination of the facts.

What are these facts? The unions had made repeated efforts for a period of approximately one year to persuade and convince Respondent's employees that they should join these labor organizations, and to be authorized to represent the employees. These "organizational" efforts remained totally unsuccessful (R. 8-11, 12, 16). The trial court specifically found that the employees *did not desire* to join these labor organizations (R. 16).

Only after the futility of such peaceful-persuasion methods had become apparent, did Petitioners commence to inflict coercive pressure upon the employer by picketing its place of business (R. 4). The immediate result was that Respondent was cut off from its sources of supply and was deprived of the services of the trucking companies, the drivers of which refused to haul goods and materials to and from Respondent, and the consequent damage to Respondent's business — largely dependent upon trucking transportation—was substantial (R. 16, 17).

The ostensible *motive* of Petitioners for engaging in this picketing is said to have been to advertise that Respondent's employees were not affiliated with the A.F.L. (Pet. Br. 27). Such motive might, perhaps, be legitimate and proper, if the actual and primary purpose of such picketing is to persuade non-union employees to join the

union.[13] Here, in view of the union's *past unsuccessful* acts of "persuasion," the intent of Petitioners, no doubt, was not merely to engage in acts of "peaceful persuasion." Here the *intent* was, and only could have been, to place economic pressure upon the neutral, innocent employer because the prior acts of peaceful persuasion and solicitation directed against its employees themselves had proven totally unsuccessful (R. 16). The picketing, quite naturally, was intended to constitute the *added next step*, productive of forcible economic sanctions, in the inexorable standard procedure of unions to bring unorganized workers "into line." This was *more than* peaceful persuasion: it was purposely intended and calculated to cause severe economic harm to the neutral employer through the exertion of coercive pressure, and such coercion was applied openly, directly and effectively. The situation was exactly as described by Mr. Chief Justice TAFT in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, at 204:

> "We are a social people and the accosting by one of another in an inoffensive way, and an offer by one to communicate and discuss information with a view to influencing the other's action, are not regarded as aggression or a violation of that other's rights. *If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging, become unjustifiable annoyance, and obstruction which is likely soon to savor of intimidation.*" (Emphasis supplied)

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[13]There exists serious doubt whether, in many situations, it can be said, considered realistically, that a union's picketing is directed at the employees, rather than against the employer, in view of the "signal" effect of the picketing and of its natural and commonly-known concomitants, that is, of "established union policies and traditions." *Local Union No. 10 v. Graham*, 345 U.S. at 200. See *infra*, p. 15ff.

To the same effect, *Thomas v. Collins*, 323 U.S. 516, 538-9; *Boca Raton Club v. Hotel Union*, — Fla. —, 83 So. 2d 11, 16; *Bitzer Motor Co. v. Local 604, I.B. of T.*, 349 Ill. App. 283, 110 N.E. 2d 674, 677; *Independent Dairy Workers Union v. Milk Drivers Local 680*, 23 N.J. 85, 127 Atl. 2d 869, 875; cf., *Self v. Wisener*, — Ark. —, 287 S.W. 2d 890, 892.

It is clear that here the union had no hope of winning over the employees by peaceful persuasion, and that it, therefore, resorted to picketing coercive of employer and employees.[14]

2. The "Signal" Effect of the Picketing, Under the Circumstances Present, Discloses the Employer as the Only Possible Target.

The record discloses a cumulative chain of direct and circumstantial evidence fully supporting Respondent's contention — and the finding of the Wisconsin Supreme Court (R. 35-37) — that it was the purpose of the petitioner unions to coerce the employer.

It is, of course, common knowledge that picket lines will not be crossed by employees, or other parties, who have some direct or indirect interest in the matter. These are the "established union policies and traditions" noted in *Local Union No. 10 v. Graham*, 345 U.S. at 200, which evoke the "loyalties and responses" adverted to in *Hughes v. Superior Court*, 339 U.S. 460, 465. It is a cardinal trade union principle that their members are not to cross

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[14] The N.L.R.B. has recently held that such picketing may be considered tantamount, even, to a present demand for recognition. *Jerome E. Mundy Co., Inc.* (Nov. 2, 1956), 116 NLRB No. 211, 39 LRRM 1029. The instant case would thus clearly fall under the facts and holding of *Building Service Employees v. Gazzam*, 339 U.S. 532.

union picket lines, "organizational" or otherwise.[15] In fact, Petitioners concede[16] that "a picket sign is the traditional symbol of the existence of a labor dispute."

This "signal" effect of the picket sign acquires particular and forceful potency where, as here, the drivers of the trucking companies servicing Respondent are members of one of the very unions which did the picketing. It would indeed be unrealisitic and completely artificial to say that, under such circumstances, the purpose of the picket sign was merely to advertise the non-union status of Respondent's employees, or merely to enlist the support of sympathizers. Rather, the picket sign is the "signal" to all union men, and particularly truck drivers, not to cross such picket line, on pain of fines and other discipline.

It is a pure myth to hold that the truck drivers here, or union men in general, were refusing to cross the picket line *voluntarily* or because they were persuaded intellectually by the merits of Petitioners' cause. In actual fact union men will not cross picket lines simply because they fear disciplinary consequences.[17]

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[15] See Teller, *supra* Note 11, 56 *Harv. L. Rev.*, at 201; Rothenberg, "Organizational Picketing," 5 *Lab. L. J.* 689, 694 (1954); Gregory, *Labor and the Law*, 347-8 (Rev. Ed., 1949)

[16] Pet. Br. 26.

[17] A. H. Raskin, well-known *Times* labor reporter, in a very recent news article appearing in the *New York Times*, Feb. 2, 1957, p. 1, discusses retaliatory threats by high Teamsters Union officials to discontinue the honoring of picket lines of those labor organizations which are deemed to be hostile to the Teamsters Union. John J. O'Rourke, President of the International Joint Council in New York, is quoted as announcing that he would instruct the 125,000 truck drivers and warehousemen under his jurisdiction to cross picket lines established by unions that "spend all their time kicking our brains out." In like vein, James R. Hoffa, of Detroit, well-known International Vice President of the Teamsters, "and a dominant figure in the truck union's

That this trade union policy (that members are not to cross picket lines) is more than merely a plea directed to the uninhibited discretion of its members, is fully borne out by the prevalence of so-called "hot cargo" clauses[18] in practically all of the Teamsters Union contracts, and in many others.

As long as labor unions insist upon inculcating the idea in the minds of their members that they must not cross picket lines, whether they be, allegedly, informational, organizational or otherwise, and as long as "hot cargo" clauses are the established practice in labor contracts, Petitioners, and labor organizations in general, cannot be heard to say that picketing constitutes "mere peaceful persuasion," particularly where, as here, the picketing has been preceded by a twelve month period of unsuccessful effort to solicit or "persuade" Respondent's employees to become union members.

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affairs," is reported to have indicated that Teamsters joint councils in other areas would likely adopt the same policy whenever they felt that local leaders of other unions were supporting moves hostile to the Teamsters. *Obviously, no such "instructions" are necessary if there are not now in existence directives that Teamsters Union members are not to cross the picket lines of other unions.*

Significantly, Mr. Raskin went on to say: "Through their control of deliveries of raw materials and finished products, truck drivers are often the make-or-break element in strikes called by other unions. By ignoring picket lines they can make it impossible for sister unions to win their strikes or organizing campaigns." See also the authorities listed in Note 15, *supra.*

[18]Such clauses grant employees the right to refuse to go through picket lines or to handle "unfair" goods. For a discussion of the importance, impact and extent of "hot cargo" clauses, see elsewhere in this brief, *infra*, p. 43.

[19]See *infra*, p. 43, citing an authoritative statement of, *inter alia*, Petitioners' counsel that "hot cargo" clauses are in existence in Teamster contracts "through the length and breadth of the United States, and have been for many years."

In the light of these clearly established and predictable effects of the picketing, it would be most artificial, and devoid of any realism, to say, as did the trial court (R. 1), that the picketing was directed at the employees in order to persuade them to organize and affiliate with petitioner unions and, therefore, to denominate the Petitioners' conduct as "organizational picketing."[20] We cannot improve upon the words of Professor Rothenberg, who most aptly described this kind of a situation as follows:[21]

> "It is sheer mockery to hold that organized labor, which itself devised those strategies, is not aware of the effect of craftily located 'organizational' picket lines—the naming and defaming of employers on the placards and/or the *'signal' effect* of the picket line. It is these facts, and not the adroit or clever manipulation of terms and phrases or smirking claims of constitutional exemption, that are the best evidence of intention and, hence, objective *** Since all experience, the cardinal dogma and the very nature of unionism leads inevitably to the firm conviction that the prime objective is to bring illegal pressure upon the employer, organized labor cannot

[20] It is sometimes claimed that there is a difference between so-called "organizational" picketing and "recognition" picketing. See Pet. Br., p. 31, Note 33. An analysis of the ingredients, nature and objects of the picketing, whether *claimed* to be for the purpose of organizing the employees or for the purpose of gaining recognition from the employer, completely refutes such an alleged distinction. Petro, "Recognition and Organizational Picketing," 3 *Lab. L. J.* 819, 821; Petro, "Recognition Picketing Under the N.L.R.A.," 2 *Lab. L. J.* 802, 805 (1951); Petro, "Free Speech and Organizational Picketing:—1952," 4 *Lab. L. J.* 3 (1953); Rothenberg, "Organizational Picketing," 5 *Lab. L. J.* 689 (1954); Benetar and Isaacs, "Pickets or Ballots," 40 *A.B.A.J.* 848, 850-2 (1954); Gregory, "Picketing and Coercion: a Defense," 39 *Va. L. Rev.* 1053 (1953); *Blue Boar Cafeteria v. Hotel & Restaurant Union*, Ky., 254 S.W. 2d 335, 339, *cert. den.* 346 U.S. 834; *Wilbank v. Bartenders Union*, 360 Pa. 48, 60 A. 2d 21, 22, *cert. den.* 336 U.S. 945.

[21] Rothenberg, *supra* Note 20, at p. 694.

be permitted to preemptorily cancel out the verities and to immunize itself by the tonguing of the term 'organizational.'" (Italics ours).

In the light of these considerations, it is not surprising that the picketing, here, was completely effectual (R. 16) in that Respondent was completely deprived of pick-up and delivery service.[22] The effect of this picketing was thus clearly confirmatory of its primary purpose, as alleged in the Complaint (R. 5-6) and as found by the court below. *Local Union No. 10 v. Graham*, 345 U.S. 192, 200, 201. All the facts and circumstances surrounding the picketing, as disclosed by the record, together with what is common knowledge as to the "signal" effect and efficacy of picketing, and its coercive elements *per se*, confirmed by the actual events, completely sustain Respondent's contention as to its purpose, and entirely refute Petitioners' position which is supported only by what *they say* the purpose was. The character of the picketing must be determined not by Petitioners' bare assertions, but by the quality of their conduct.

3. The Employer Was Subjected to Economic Coercion in Order to Induce It to Intimidate Unwilling Employees into Joining the Union, in Violation of Section 111.06(2)(b).

Petitioners claim that they merely engaged in "peaceful persuasion" when undertaking the picketing in the instant case, but to take such a view is to ignore the stark realities of the situation.

Let us again review the pertinent facts. For about a year Petitioners had been making unsuccessful efforts (R. 8-11, 12, 16) to convince the Respondent's employees

[22] See Note 17, *supra*.

that they should join the union. After failure of these efforts, and only then, did they begin to picket (R. 4). *But the very commencement of the picketing signified the termination of activities which could be called "peaceful persuasion".* The coercive and intimidating element was added. *Thomas v. Collins*, 323 U.S. 516, 538-9.

Nor can it be honestly maintained that the purpose of the picketing was for information. Needless to say, *employees* who for a year were the objects of unsuccessful union solicitations need not be "informed" that they are "not*** affiliated with the A.F.L." (R. 36). They already know that! Likewise, the *employer* unquestionably is aware of the "unorganized" status of its employees, for no bargaining or recognition demands had been made upon it. And the *general public* could not possibly have been the target of the messages on the picket signs, since the "general public" did not frequent to any substantial extent a lonely town road P in rural Waukesha County where Respondent's gravel pit is located (R. 3, 16, 35, 36).

Since the pickets, clearly, were not employed, primarily, either for the persuasion of employees or for the dissemination of information, their only possible object could, and must, have been to produce the very effect which, as previously pointed out, Petitioners knew would result. "The immediate results of the picketing demonstrated its potential effectiveness, unless enjoined, as a practical means of putting pressure on the" Respondent. *Local Union No. 10 v. Graham*, 345 U.S. 192, 201.

This places the case squarely under the well-established common law rule that one must be held with having *intended* the foreseeable consequences of one's conduct, i. e., that which reasonable men would normally anticipate to flow from such conduct. *Radio Officers Union v.*

N.L.R.B., 347 U.S. 17, 47; cf., *Aikens v. Wisconsin*, 195 U.S. 194, 205; *Local Union No. 10 v. Graham, supra* at 200. As was said by the Court below in *Estate of Grossman*, 250 Wis. 457, 461, 27 N.W. 2d 365, 367:

> "The intention of the parties to any particular transaction may be gathered from their acts and deeds, in connection with the surrounding circumstances, as well as from their words * * *."

Applying these principles to the instant situation, the unions here must be deemed to have intended those results and effects falling upon the neutral employer, Respondent herein, which would foreseeably and naturally result from their acts of picketing. That Respondent would be completely cut off from its sources of supply, to its great damage and injury, was clearly foreseeable by Petitioners and, therefore, they must have intended such result. In view of their prior unsuccessful acts of non-coercive persuasion, there can be no doubt that Petitioners engaged in picketing for an unlawful purpose, viz., in order to induce Respondent, by coercive means, to intimidate its employees to join the union. To ignore such a realistic appraisal of the facts would make a nullity, an empty gesture, out of the right, guaranteed to employees by Sec. 111.04, Wis. Stats. (1953), to join or to *refrain from joining* a labor organization.[23]

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[23] See Petro, "Recognition and Organizational Picketing," 3 *Lab. L. J.* 819, at 821 (1952): " * * * *In 'organizational picketing' the union deliberately inflicts economic harm upon the employer as a means of inducing the employees to become members and to choose the picketing unions as exclusive bargaining representative. This type of picketing, like recognition picketing, beyond any doubt amounts to a deliberate infliction of harm, in fact, upon* both *the employer and the reluctant employees; like recognition picketing, indeed like all picketing, it tends to cut off the employer from his vital markets and thus to threaten both the business involved and, derivatively, the employment of its employees.*" And see Rothenberg, "Organizational Picketing," 5 *Lab. L. J.* 689, 694 (1954).

It has been established that, by means of coercive pressure exerted upon the employer, with its perfectly foreseeable consequences, Petitioners intended to cause a cessation of the pick-up and delivery service, thus cutting off its business from its sources of supply. But the strangulation of a business by such methods certainly cannot be considered a natural or logical method of "persuading" *employees* to join the union — it is a *modus operandi* calculated to affect directly, not the employees, but the *employer* in order to compel it to coerce its employees[24] in their rights of self-organization.

C. If the Injunction Were Dissolved, the Employer Would Have to Choose Between Loss of Its Business or Violating the Law.

We submit that if the picketing here in question were found to be non-enjoinable, under the facts disclosed by the record, the employer would be placed in the anomalous position of either having to violate the law of Wisconsin or, in the alternative, suffer economic ruin. This was recognized by the court below when it found

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[24]Compare speech of N.L.R.B. General Counsel, Theophil C. Kammholz, before Institute of Management and Labor Relations, Rutgers University, November 27, 1956 (NLRB Release No. R-513, p. 15), where he pointed out that "it is settled" that when a minority union pickets for exclusive recognition, it "is trying to persuade the employer himself to commit an unfair labor practice." See also *Shepherd Machinery Co.*, N.L.R.B. Case Nos. 21-CB-805 and 21-CC-229 (Trial Examiner's Intermediate Report, Nov. 6, 1956), where it was pointed out (p. 8) that when a union pickets an employer whose employees had previously repudiated such union at the polls, the picketing was for the purpose of coercing the employer and the employees in the exercise of their rights guaranteed by Section 7 of the Federal Act. (Section 7 is analogous to Sec. 111.04, Wis. Stats. (1953)). Accord: *Alloy Manufacturing Co.*, N.L.R.B. Case No. 19-BC-430 (Intermediate Report, Jan. 15, 1957) 39 LRR 205, 206. The General Counsel of the N.L.R.B., thus, no longer adheres to the position taken in earlier years, adverted to by Petitioners (Pet. Br. 32 n. 34).

that the picketing had been undertaken for an unlawful purpose (R. 36). In a situation such as here, an employer has open to it only two means, and none other, by which to extricate itself from the controversy and its economic consequences, a controversy into which it was drawn unwittingly and involuntarily:

> (1) The employer can recognize and deal with the union, or it can force or induce its employees to join the union, and if it were to engage in either or both of these acts it would be violating subsections (a), (b), (c) and (e) of Sec. 111.06(1), Wis. Stats. (1953) (App., *infra*, p. 58-9). It would, thereby, be depriving its employees of their right to free choice with respect to union representation.
>
> (2) Or it can permit the continuance of the picketing, suffer the vast economic losses engendered thereby, and, eventually, be compelled to go out of business altogether, thereby reducing its employees' earnings, even to depriving them of their livelihood. Few can endure for any length of time the damage and injury caused by strangulation of transport services.[25]

When an employer is faced with such a dilemma as here, where the only way to escape the picketing and its consequences is by violating the law, this Court has not hesitated to uphold a state's proscription of the picketing. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 493; *Building Service Employees v. Gazzam*, 339 U.S. 532, 540. If the picketing were held to be constitutionally protected, *it would enable a union effectively to put an em-*

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[25] Especially in view of this second alternative, an employer would be deprived of property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution if the picketing were held to be non-enjoinable. The employer would have no remedy to right so obvious a wrong. For a fuller discussion of this issue, see *infra*, p. 49ff.

ployer out of business whenever his employees exercised their right, guaranteed them by Sec. 111.04, Wis. Stats.,[26] *to refrain from joining a labor organization!*

D. Petitioners' Claim That the Facts Would Not Support a Finding of Unlawful Purpose Is Unreal and Without Merit.

In their brief, Petitioners argue that the evidentiary facts[27] could not support a finding of unlawful purpose. The thorough analysis made of these facts earlier in this brief clearly disprove such an assertion. Petitioners refuse (Pet. Br. 22-30) to consider all of the facts as a whole, in their totality, and argue that a finding of unlawful purpose was not justified solely on the basis of a consideration of each factual ingredient or facet, *standing alone*.

Thus, they attempt to equate the fact of unsuccessful solicitation followed by picketing with unsuccessful pamphleteering followed by publication of a newspaper ad (Pet. Br. 23). But advertising in a newspaper or pamphleteering is not on a par with picketing, peaceful or otherwise. *Hughes v. Superior Court*, 339 U.S. 460, 464-5.

Respondent does not contend that solicitation of employees by a union is in any way unlawful, as Petitioners

[26] To the same effect, Section 7, National Labor Relations Act, as amended, 29 U.S.C.A. § 157.

[27] Throughout their brief, petitioners refer to "undisputed evidence." In reality, the facts here are not undisputed, as becomes apparent upon an examination of the Complaint (R. 3), and of the Answer (R. 12) herein. While many of the facts alleged by Plaintiff were admitted or uncontradicted, by defendants below, the primary reason why the Wisconsin Supreme Court made its own findings on review was because the record consisted of "no more than pleadings and affidavits" (R. 37), and contained no oral testimony.

appear to imply (Pet. Br. 22-23). It is submitted that unsuccessful solicitation—where, as the trial court found (R. 16), the employees indicated that they did not desire to join the union and, at the time of the trial, had continued to refuse to become members of the unions—followed by picketing at a locale where there can be no question but that such picketing was directed only at the employer, does not constitute "peaceful persuasion" or merely the communication of ideas. It is coercive intervention, based on the economic sanctions inherent in the picketing.

The gravamen of the unlawfulness of the picketing here is not that one means of communication (solicitation) followed another alleged mode of communication, but that an activity inherently coercive followed the *unsuccessful* attempts to persuade the employees to join the union.

Nor is it the size of the audience, or the locale, as such, of the picketing, which led the Wisconsin Supreme Court to find that the picketing was undertaken for an unlawful objective. It was from the situs of the picketing that the Wisconsin Court inferred, quite naturally, that the composition of the potential audience was such that the picketing could have been directed only against the employer, b cause of the "signal" effect which it had, and foreseeably would have, upon union truck drivers and their confederates. Since both the employer and the employees were well aware of the message which the picket signs purported to convey, the finding of the Court below (R. 35-36) that the purpose of the picketing was to coerce the Respondent to cause it to compel or induce its employees to become members of Petitioners is the only one realistically possible under the circumstances.

Petitioners claim (Pet. Br. 27) that the finding, below, was based upon the fact that economic loss "might induce the employer to violate the law." Such a statement, however, does not tell the whole story. The employer could disentangle itself from the picketing only if it violated the law by coercing its employees to join the union. See *supra*, p. 22.

It was not economic loss, standing alone, which was considered by the Wisconsin Supreme Court in finding the existence of an unlawful purpose, but the fact of economic loss in the light of *all* of the circumstances present in the instant controversy; it was the picketing, foreseeably resulting in economic loss, coupled with the fact that the picket line here could not possibly have any other effect. Such effect was confirmatory of its purpose. *Local Union No. 10 v. Graham*, 345 U.S. 192, 200.

Petitioners interpret the decision of the Court below (Pet. Br. 33) as holding that whenever the employees of the picketed establishment are not members of the picketing union, then the picketing is to have been undertaken for the purpose of coercing the employer to induce its employees to join the union. In truth, however, it was found that the picketing was done for such a purpose on the basis of numerous *other* facts, all analyzed by the Court below in great detail (R. 35-36).

In brief, it is not each isolated facet of the factual situation which, as we have said, determines, standing alone, whether the finding of the Court below was warranted; it is a consideration of all of the facts and of the natural and reasonable inferences flowing therefrom which establish the correctness of the finding.

Indeed, the Wisconsin Court is not alone in arriving at such a conclusion under the facts disclosed by the

record. Many other courts have also recognized the coercive nature, *per se*, of picketing conducted under circumstances similar to those here present, and found it to have been engaged in for an unlawful object, viz., for the purpose of coercing the employer to induce or force its employees to join a union. *Pappas v. Stacey*, 151 Me. 36, 116 A. 2d 497, 500, *appeal dismissed* 350 U.S. 870; *Postma v. Teamsters Union*, 334 Mich. 347, 54 N.W. 2d 681, 684, *cert. den.* 345 U.S. 922; *Audubon Homes, Inc. v. Spokane Bldg. & Const. Trades Council*, —*Wash.*—, 298 P. 2d 1112, *cert. pending* No. 618; *Blue Boar Cafeteria v. Hotel & Restaurant Union*, — Ky. —, 254 S.W.2d 335,339,*cert.den.* 346 U.S.834; *Miami Typographical Union v. Ormerod*, (Fla. 1952) 61 So. 2d 753; *Baderak v. Bldg. Trades Council*, 380 Pa. 477, 112 A. 2d 170, 173; *Sansom House v. Waiters Union*, 382 Pa. 476, 115 A. 2d 746, 750, *cert. den.* 350 U.S. 896; *Tallman Co. v. Latal*, Mo. Sup. Ct. (Div. No. 2), No. 43437, March 8, 1954, 33 LRRM 2725, 2729, 25 CCH Labor Cases, Par. 68,207; *Boca Raton Club v. Hotel Union*, — Fla. —, 83 So. 2d 11, 16; *Fairlawn Meats Inc. v. Meatcutters Union*, 99 Ohio App. 517, 135 N.E. 2d 689, *cert. granted* 351 U.S. 922; *Anderson v. Local No. 698, Retail Clerks Union*, — Ohio App. —, 38 LRRM 2324, 30 Labor Cases, Par. 70,185, *appeal dismissed* 165 Ohio St. 512, 137 N.E. 2d 752.

One would be credulous, indeed, to believe that the appellate courts of the several states are engaging in the practice of making "spurious" findings, without any factual support from the respective records. The only reason why Petitioners[28] claim that the findings of the Court

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[28]and the American Federation of Labor and Congress of Industrial Organization in its brief *amicus curiae*.

below, and those of other courts, were not supported by the evidentiary facts is because they would have us continue to believe in the fiction that picketing is to be nearly always equated with free speech and that, under the circumstances of this case, it was done solely for advertising and for peaceful persuasion. Such a view of the picketing, under present-day circumstances, is surely unsound, naive and devoid of realism.

II.

THERE ARE NO EXCEPTIONAL CIRCUMSTANCES JUSTIFYING THIS COURT TO REJECT THE FINDINGS OF THE WISCONSIN SUPREME COURT.

We do not quarrel with the proposition that this Court has the power to search the record and examine the finding of the court below where constitutional questions are involved, but that does not mean that this Court will re-examine, as a court of first instance, findings of fact of state supreme courts. *Norton Co. v. Department of Revenue*, 340 U.S. 534, 538. Such independent examination is made by this Court only where "exceptional circumstances" are present. Here, "there are no exceptional circumstances of any kind that would justify [this Court] in reviewing the Supreme Court's findings. *They are not without factual foundation,*" and this Court should accept them. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160. Ordinarily, this Court will not re-examine a state court's findings and conclusions of fact. *Grayson v. Harris*, 267 U.S. 352, 358; *Portland R. Co. v. Railroad Commission*, 229 U.S. 397, 412; *Fry Roofing Co. v. Wood*, *supra*.

Petitioners claim (Pet. Br. 13) that because the facts are allegedly undisputed in the instant case, this Court should make its own independent analysis and draw its own inferences as to their ultimate effect. The fact of the matter is, however, that the findings of the court below were not based upon facts which were entirely undisputed.[29] See *supra*, p. 24, Note 27.

In order for this Court to disregard the finding of the court below, the latter must have clearly and obviously ignored a constitutional mandate when making its own findings, as stated by this Court in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, at 293-4:

> "*** It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. *We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guaranty here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority.*" (Emphasis supplied)

Petitioners, on two separate occasions (Pet. Br. 8, 36), have characterized the finding made by the Supreme

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[29]Petitioners argue (Pet. Br. 13, Note 5) that the Wisconsin Supreme Court substituted its own findings for those of the trial court because the facts were allegedly undisputed. However loose the language referred to by Petitioners, in actuality the Wisconsin Supreme Court supplied its own findings—not because of allegedly undisputed facts—but because the trial court's findings were based solely upon *pleadings and affidavits* and in the absence of any oral testimony (R. 37, 38). This principle, invoked by the court below, is also applied in the Federal courts. 2 Barron & Holtzoff, *Federal Practice and Procedure*, (1950), Sec. 1134, p. 849. *Orvis v. Higgins* (C.A. 2), 180 F. 2d 537, 539, *cert. den.* 340 U.S. 810.

Court of Wisconsin as being "spurious."[39] We submit that the facts of this case, as disclosed by the record, and the reasonable and natural inferences deduced therefrom, fully support the finding made by the court below — as the only one possible under the circumstances. There is no justification whatever for imputing to one of the outstanding state courts of last resort so sinister and irreverent a scheme. The finding of the Wisconsin Supreme Court was not "counterfeit," is was not "false."

The Court below found that Petitioners' conduct violated Sec. 111.06(2)(b), Wis. Stats. (1953). That statute was part of the declared public policy of the state which embraced the "*** State's social and economic policies, which, in turn, depend on knowledge and appraisal of local social and economic factors ***." *Teamsters Union v. Hanke,* 339 U.S. 470, 474-5. "When the highest court of a state has reached a determination upon such an issue, *** most respectful attention to its reasoning and conclusions" is given to it by this Court. *Pennekamp v. Florida,* 328 U.S. 331, 335. "*** a judgment on these matters comes to this Court bearing a weighty title of respect." *Teamsters Union v. Hanke, supra,* at 475.

This Court has laid down the policy that

> "It is not for this Court to deny to a State the right, or even to question the desirability, of fitting its law 'to a concrete situation through the authority given *** to its courts.' *** It is particularly important to bear this in mind in regard to matters affecting industrial relations which, until recently, have been left largely to judicial lawmaking and not to legislation.' ".

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[39]Webster's New International Dictionary (2d Ed., 1951) defines "spurious" as "Not proceeding from the true source or from the source pretended; not genuine; counterfeit; false."

Hughes v. Superior Court, 339 U.S. 460, 467. Wisconsin has done no more than follow this principle.

The Wisconsin Supreme Court has "the final say concerning the meaning of a Wisconsin law," and in deciding whether the finding of that Court was justified, this Court is "controlled by the construction placed by the Supreme Court of Wisconsin upon the order and the pertinent provisions of the Act." *Hotel & Restaurant E. I. Alliance v. W.E.R.B.*, 315 U.S. 437, 438, 440-1.[31]

III.

THE PICKETING, HERE, IS NOT IMMUNE FROM RESTRAINT AS CONSTITUTIONALLY PROTECTED FREE SPEECH.

A. When Peaceful Picketing is Undertaken for a Purpose Made Unlawful by State Policy, It May be Enjoined.

This Court first intimated in *Senn v. Tile Layers Union*, 301 U.S. 468, 478, (1937), that peaceful picketing was protected as free speech under the First and Fourteenth Amendments to the Constitution. Subsequently, that doctrine received more sweeping and forceful expression in *Thornhill v. Alabama*, 310 U.S. 88; *Carlson v. California*, 310 U.S. 106; and *A.F.L. v. Swing*, 312 U.S. 321. In the latter case the "picketing-free speech" principle may be said to have reached its apex, for in *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 775, this

[31] Petitioners assert that the picketing was directed at Respondent's employees. Although, under the circumstances present, such could not possibly have been the true purpose, it should be noted that the Court below has not construed the Wisconsin statute to "prohibit the picketing of workers by other workers" and the decree does not have that effect. Cf., *Building Service Union v. Gazzam*, 339 U.S. 532, 539-40.

Court warned that where picketing was attended by " * * * , coercion, or conduct otherwise unlawful or oppressive" it might be subject to restraint notwithstanding the Fourteenth Amendment. The same decision recognized (p. 776), for the first time, that "picketing by an organized group is more than free speech" which makes it " * * * the subject of restrictive regulation." In *Thornhill* this Court had used broad language, thereafter often interpreted as equating picketing with speech,[32] for the purpose of holding unconstitutional an Alabama statute which prohibited all picketing, without exceptions as to either the number of pickets, their demeanor, *the nature of the dispute* or the accurateness of the message conveyed.[33]

Other cases following in the footsteps of the *Wohl* case, strongly indicated that the constitutional protection of picketing was not without limitations. *Cafeteria Employees Union v. Angelos,* 320 U.S. 293; *Thomas v. Collins,* 323 U.S. 516. In the latter case, this Court cautioned (p. 538-9) that when to persuasion "other things are added which bring about coercion, or give it that character, the limit of the right" guaranteed by the Constitution has been passed.

Respondent submits that the broad concept of the constitutional protection attached to picketing, set forth in these cases, may have arisen, and probably did arise, as a result of the conditions prevailing in the years before and

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[32]The *Thornhill* decision and the picketing-free speech cases immediately following, have been frequently criticized. Corwin, Book Review, 56 *Harv. L. Rev.* 484, 486 (1943); and see Professor Corwin's comment in *The Constitution and What It Means Today,* 197 (10th ed., 1948); Gregory, *Labor and the Law* 349 (Rev. ed., 1949); Gregory, "Peaceful Picketing and Freedom of Speech," 26 *A.B.A. J.* 709 (1940).

[33]Cf., *Teamsters Union v. Hanke,* 339 U.S. 470, 474 n. 1.

immediately following the enactment of the Wagner Act[34] when the opportunities, bargaining power and social and economic status of organized labor were at a low ebb. At any rate, since that time this Court has issued a series of decisions[35] which make it clear that picketing *per se* is not to be equated with Constitutionally protected free speech and that there still exist many situations in which the states could properly exercise their authority in limiting the right to picket.

In the meantime, during that very period, organized labor grew substantially in numbers, wealth, bargaining position, and greatly improved its social, economic and political status. That growth, discussed subsequently herein (*infra*, p. 39ff.), undoubtedly must have been considered by this Court in subsequent decisions. As a parallel development, some of the states, including Wisconsin, in an attempt to channel the combative forces of employer-union competition through orderly and well-regulated processes of justice towards peaceful industrial relations, enacted comprehensive labor relations laws which placed certain restrictions upon all concerned, employer, employees and unions (see *infra*, p. 44ff.). As one of their principal objectives; these laws guarantee employees the right to self-organization and the right to join or not to join a labor organization, free of interference and coercion from any source.[36]

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[34]49 Stat. 449 (1935).

[35]*Hotel & Restaurant E. I. Alliance v. W.E.R.B.*, 315 U.S. 437; *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U.S. 722; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490; *Hughes v. Superior Court*, 339 U.S. 460; *Teamsters Union v. Hanke*, 339 U.S. 470; *Building Service Employees v. Gazzam*, 339 U.S. 532; *Local Union No. 10 v. Graham*, 345 U.S. 192.

[36]See Secs. 111.01 and 111.04, Wis. Stats. (1953), App. *infra* pp. 57-8; Sec. 7 of the N.L.R.A., as amended, (29 U.S.C.A., Sec. 157) is analogous.

Picketing which tends to interfere with these rights by inflicting coercive pressure, either upon the employer so as to compel him to violate these rights, or directly upon the employees, obviously is undertaken for an object violative of such policy. It is precisely this type of picketing which the Wisconsin Supreme Court has enjoined, for that Court found, after a thorough analysis of the facts (R. 35, 36), that the picketing here had been engaged in for the purpose[37] of coercing the employer to compel its employees to join or be represented by petitioner unions.

This holding of the Court below is not at all inconsistent with the view taken, more recently, by this Court of picketing and of the right of the State to control it. Indeed, it has been held that picketing is more than speech and usually does produce results not ordinarily associated with the mere dissemination of ideas:

> "But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.' [Citing cases] Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patroling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word."

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[37] Made unlawful by Sec. 111.06(2)(b), Wis. Stats. (1953), App. *infra*, p. 59.

Hughes v. Superior Court, 339 U.S. 460, 464-5. To the same effect, *Teamsters Union v. Hanke*, 339 U.S. 470, 474; *Building Service Employees v. Gazzam*, 339 U.S. 532, 536-7. When picketing brings about coercion or gives it that character, it ceases to be protected by the Constitution, *Thomas v. Collins*, 323 U.S. 516, 538-9, and is then subject to control by the State. And, again, in *Hughes v. Superior Court, supra*, at 465:

> "* * * And we have found that because of its element of communication picketing *under some circumstances* finds sanction in the Fourteenth Amendment. [Citing cases.] However general or loose the language of opinions, the specific situations have controlled decision. *It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State* if the manner in which picketing is conducted or *the purpose which it seeks to effectuate gives ground for its disallowance.* [Citing cases.] A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual." (Emphasis supplied)

Cf., *Teamsters Union v. Hanke, supra*, at 474-5; *Building Service Employees v. Gazzam, supra*, at 537.

Certainly a State is free to adopt a policy condemning coercive interference with free employee choice of bargaining representatives and a State can prohibit such coercive interference by unions as well as by employers.[38]

The picketing, having as its purpose a desire to injure the Respondent so as to induce it to commit an unlawful act, was clearly engaged in for an unlawful purpose.

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[38] Petro, "Free Speech and Organizational Picketing in 1952," 4 *Lab. L. J.* 8 (1953).

Consequently, the action of the Court below did not conflict with constitutional guaranties.[39]

1. The Picketing, Here, Was Not Enjoined Because of the Absence of an Employer-Employee Dispute.

Petitioners assert (Pet. Br. 30 ff.) that the decision of the Court below, in fact, was based on the alleged absence of an employer-employee dispute and they rely especially upon *A.F.L. v. Swing*, 312 U.S. 321 and *Bakery Drivers Local v. Wohl*, 315 U.S. 769, as authority for their claim that such decision violated the free speech guaranties of the Constitution.

It should be pointed out that Respondent's complaint alleged (R. 6) that Petitioners' conduct was violative not only of Sec. 103.535[40], but also of Sec. 111.06(2)(b), Wis. Stats. (1953). The decision and the findings of the trial

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[39]See cases cited in Note 35, *supra*.

[40]Sec. 103.535, Wis. Stats. (1953), provides:

"103.535 *Unlawful conduct in labor controversies.* It shall be unlawful for anyone to picket, or induce others to picket, the establishment, employes, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business, or interfere with any person or persons desiring to transact or transacting business with him, when no labor dispute, as defined in subsection (3) of section 103.62, exists between such employer and his employes or their representatives."

Sec. 103.62(3), Wis. Stats. (1953), referred to in Sec. 103.535, provides:

"(3) The term 'labor dispute' means any controversy between an employer and the majority of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. The provisions of this subsection shall supersede any provision of the statutes in conflict therewith."

court (R. 1-2, 15-18) rested solely upon a conclusion that Sec. 103.535 had been violated.[41] The first opinion of the Wisconsin Supreme Court likewise was predicated upon a violation of Sec. 103.535, Wis. Stats. (1953). (R. 24).

The second decision of the Wisconsin Court, however, was not at all based upon a violation of Secs. 103.535 and 103.62(3), Wis. Stats. (1953), but involved the question, exclusively (R. 29), whether the facts, and the natural inferences deducible therefrom, would support a finding that Sec. 111.06(2)(b), Wis. Stats. (1953) had been violated. After a thorough analysis the Court below so found. (R. 30, 35-6).

The Wisconsin Supreme Court's judgment, therefore, is *not* grounded on the absence of a labor dispute between the employer and its employees, i.e., is not based upon a violation[42] of Secs. 103.535 and 103.62(3), Wis. Stats. (1953). It is particularly noteworthy that the Court below specifically held (R. 41):

> "Our decision is not to be construed as holding that the state may forbid peaceful picketing solely because there is no immediate employer-employee dispute as was held in the *Swing* case."

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[41]The trial court had rejected a finding that Sec. 111.06(2)(b) had been violated. (R. 25, 35).

[42]Sec. 103.535 was held unconstitutional in *City of Waukesha v. Plumbers Local No. 75*, 270 Wis. 322, 71 N.W. 2d 416, decided on the same day as the first opinion of the Wisconsin Supreme Court in the instant case. In that case the Wisconsin Court pointed out that there was lacking a formal finding by the trial court, or a demand for one, that the picketing had been undertaken for an unlawful purpose. The Court intimated, as did this Court in *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 775, that had the record contained a finding of unlawful purpose it might have reached a different result. In the *City of Waukesha* case, as in the first opinion of the instant case, the decision rested exclusively upon the absence of an employer-employee dispute.

As stated, in *Hotel & Restaurant E. I. Alliance v. W.E.R.B.*, 315 U.S. 437, 440-1, under similar circumstances, what is before this Court is the opinion and finding of the Wisconsin Supreme Court which has, of course, the final say concerning the meaning of Wisconsin law. "And that Court has unambiguously rejected the construction upon which the claim of Petitioner rests." Cf., *City of Waukesha v. Plumbers Local No. 75*, 270 Wis. 322, 71 N.W. 2d 416.

The facts and applicable statutes totally distinguish the instant case from *A.F.L. v. Swing, supra*,[13] and *Bakery Drivers Local v. Wohl, supra*. The instant case must, therefore, be distinguished from *Swing* exactly as this Court distinguished *Swing* in the *Gazzam* case, 339 U.S. 532, at 539:

> "Petitioners insist that the Swing Case, 312 U.S. 321, supra, is controlling. We think not. In that case this Court struck down the State's restraint of picketing based solely on the absence of an employer-employee relationship. An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative. Peaceful picketing for any lawful purposes is not prohibited by the decree under review. The state has not here, as in Swing, relied on the absence of an employer-employee relationship. Thus the state has

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[13] The *Swing* case, in particular, appears to have lost its vitality. In *Swing*, the union officials had called upon the employer and "demanded that he require all of his employees to join that union, to which none of them belonged, and to which none of them wished to belong." See *Swing v. A.F.L.*, 372 Ill. 91, 22 N.E. 2d 857. These facts describe a situation, involving union demand for recognition, exactly as was present in *Building Service Employees v. Gazzam*, 339 U.S. 532. Based upon this analysis of the facts, the *Gazzam* case must be deemed to have emasculated the *Swing* rule, at least with respect to situations controlled by statutes such as were present in the *Gazzam* case and in the case at bar. Illinois had no such statute.

> not, as was the case there, excluded 'workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.' 312 U.S. at 326."

Moreover, since there *were* here facts and circumstances from which the Court "can draw the inference that the [picketing] was attended or likely to be attended by * * * coercion or conduct otherwise unlawful or oppressive," the *Wohl* case is here not controlling, either. 315 U.S. at 775.

B. The Circumstances Relating to Labor Relations Have Changed Greatly Since *Senn* and *Thornhill*.

1. Labor Unions Have Grown Vastly in Size and Economic Power.

In passing upon the constitutional issue here presented, this Court must, of necessity, consider the existing state of our social and economic environment and must strike a balance between competing economic interests as they affect present-day industrial society.

This Court has always been careful to point out in its earlier decisions relating to picketing and free speech that, in deciding the issues there involved, it took into consideration the *then* existing social and economic conditions and the conditions found to be existing in the field of industrial relations. Thus, in *Thornhill v. Alabama,* 310 U.S. 88, this Court called attention to (p. 102) "the circumstances of our times" and to (p. 103-4) "the interests of the society in which they exist." Mr. Justice BRANDEIS,

dissenting in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488, spoke of "the conditions [then] developed in industry." In *Teamsters Union v. Hanke*, 339 U.S. 470, 475, Mr. Justice FRANKFURTER referred to the then existing "local social and economic factors" and pointed out, at 479-80, that the established policy of a state relating to picketing must be considered realistically "in the light of modern circumstances, to what constitutes an industrial relationship or a labor dispute." Consequently, this Court has felt itself under a duty "to restrict expressions in opinions in earlier cases to their specific context." *Teamsters Union v. Hanke, supra*, at 480 n. 6.

It hardly needs reference to authorities to point out that the "context," the social and economic balance of power in industrial society, has vastly and decisively changed since this Court handed down its decisions in the earlier free speech cases, beginning with *Senn v. Tile Layers Union* (1937), 301 U.S. 468, and including *Thornhill v. Alabama* (1940), 310 U.S. 88.[44] No longer are labor organizations, and their members, helpless and impotent in relation to industry and employers in general, as noted by Mr. Chief Justice TAFT in *American Steel Foundries v. Tri-City Central Trades Council* (1921), 257 U.S. 184, 209-10. Organized labor has long since come of age and has "become a national economic force"[45] of major proportions. During the fifty year period, 1900-1950, union strength experienced a growth of more than 1400%, rising from 868,500 members in 1900 to 13.3

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[44]For a description of the economic and political factors, affecting labor, existing in 1940, see Charles O. Gregory, Book Review, 36 *Va. L. Rev.* 409 ff. (1950).

[45]"1935-1955: Twenty Years of Growth," 16 *Economic Outlook* 89, 91 (Dec., 1955), published by the Department of Education & Research of the Congress of Industrial Organizations.

million in 1950. In 1940 the unions in the United States had an actual membership of 7.87 million, thus indicating a growth, in the decade to 1950, of 69%.[46] The C.I.O.'s Department of Education & Research reports that organized labor in the U.S., in 1955, had about 17 million members.[47] A 1956 study of the National Bureau of Economic Research discloses that, by 1953, labor unions had organized 38.3% of the non-farm workers in Wisconsin.[48]

It is thus clearly apparent that labor organizations have had an immense growth, particularly since World War II, and are able to, and do, exert economic and social influence and power easily on a par with industry, or with any other segment of our society.[49]

Particularly noteworthy is the spectacular growth in power, numbers and strength which was had by the International Brotherhood of Teamsters, of which Local 695, one of the petitioners herein, is an integral part. "The growth of membership in the Teamsters Union has been phenomenal, especially in the past few years. * * * It is

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[46]Solomon, "Dimensions of Union Growth—1900-1950," 9 *Industrial and Labor Relations Review* 544, 546-7 (July, 1956).

[47]16 *Economic Outlook, supra* Note 45, at 91.

[48]"New Figures Show Union Growth," *The Nation's Business*, Oct. 1956, pp. 80-81.

[49]Irving Bernstein, in "The Growth of American Unions," 44 *American Economic Review* 301, (June 1954), points out, at p. 318:

> "Since 1946, rather than exhibiting 'saturation,' the labor movement has grown steadily at approximately the long term rate. Further, in the year 1951, it spurted forward under the impact of the Korean War. If the forces we have emphasized continue at work in the future, unionism will grow steadily in the long run, will suffer little or no loss in bad times, and will expand sharply if we are so unfortunate as to engage in wars or to sustain severe depressions."

See also Lindblom, *Unions and Capitalism*, (New Haven, 1949).

not only the biggest, but, because of the nature of its strategic position in industry, the most powerful of unions."[50] The stranglehold that this union can exert on the entire economy is at once apparent if one considers that it has organized, or exerts control over, practically the entire motor truck transportation in the United States. Our interdependent economic organization would hopelessly collapse if our national transportation system failed in any of its segments as the result of any action undertaken by this union. "Beck's[51] union has the power to make or break strikes, in other unions and in hundreds of industries. He can, and has, strangled single areas piecemeal."[52]

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[50]Bell, "The Teamsters: Big Unionism," 27 *Current History* 36, 37 (July, 1954). It is there pointed out that from a membership of 70,000 in 1933 that union grew to over 500,000 members in 1940, and to 1.3 million in Spring of 1954, then already the largest and strongest unit within the American Federation of Labor. In 1954 its treasury was said to hold in excess of $32 millions. — More recently, it was reported in the *New York Times* (Jan. 27, 1957, Section 4, p. 7) that the Teamsters' treasury had reached $37,188,000 in 1956.

In a speech made on December 16, 1956, before a stewards' graduation class of Teamsters Local 200, Milwaukee, Wisconsin, John T. O'Brien, International Vice President, stated that the Teamsters Union was now the largest labor organization in the country "and quite likely the biggest in the world." He further said that the union was now paying a per capita tax "on over 1½ million members to the AFL-CIO" and predicted continued growth in all parts of the country. Reported in *Milwaukee Labor Press*, December 20, 1956.

[51]Dave Beck, President of the International Brotherhood of Teamsters.

[52]Bell, *supra*, Note 50, at pp. 38-40. For a more recent analysis of the Teamsters Union, see Gillingham, *Teamsters Union on the West Coast*, University of California, Berkeley (1956). A. H. Raskin, in a very recent article appearing in the *New York Times*, Jan. 27, 1957, Section 4, p. 7, characterizes the position of the Teamsters Union in these words: "Like the circulatory system that carries the blood to all parts of the human body, the teamsters occupy a position in organized labor far more pervasive than their size. — Humility never has been an outstanding trait among leaders of the truck union. In virtually every community, they have used their great power to reach out for more power. * * * "

This potentially strangling control which the Teamsters Union, and its locals, can and frequently do exercise over movement, by motor trucks,[53] of the goods, materials and supplies required in commerce and industry, as a means of accomplishing union policies and objectives regardless of their nature, is perhaps best exemplified by the "hot cargo" clause which is to be found in practically all labor contracts to which the Teamsters Union, and its locals, are parties.[54] Only recently, counsel for the Teamsters Union pointed out authoritatively that "the ['hot cargo'] clause constitutes one of the most important subjects of the collective bargaining agreement * * * and is of *inestimable value* to" the union. (Emphasis supplied). Such clauses are said to be "in existence in collective agreements between teamsters unions and common carriers throughout the length and breadth of the United States, and have been for many years."[55]

It is in the light of these well-known facts relating to the present-day power and importance of labor organizations, and of the Teamsters Union in particular, that this

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[53]Also by railroad, to the extent that truck transportation is required between railroad station and business establishments.

[54]Such contract clauses, *inter alia,* specifically grant truck drivers the right to refuse to go through picket lines or to handle "unfair" goods. See *Conway's Express,* 87 N.L.R.B. 973, *aff'd* (C.A. 2), 195 F. 2d 906, 912; *Sand Door & Plywood Co.,* 113 N.L.R.B. 1210, 1214-16; *Meier & Pohlman Furniture Co. v. Gibbons* (C.A. 8), 233 F. 2d 296, 307, *cert. den.* 352 U.S. 879; "Hot Cargo Clauses and the Taft-Hartley Act," 24 *Geo. Wash. L. Rev.* 673 (June 1956). As to the practical effect of the "hot cargo" clause upon the instant situation, see p. 17, *supra,* of this brief.

[55]Pp. 2-3 of 'Petition for Leave to Intervene' of Teamsters Local 886, submitted to the Interstate Commerce Commission on June 5, 1956 by, *inter alia,* Counsel for Petitioners, herein, and by the General Counsel of International Brotherhood of Teamsters, in re *Galveston Truck Line Corporation v. Ada Motor Lines, Inc.,* I.C.C. Docket No. MMC 1922.

Court must view the declared public policy of Wisconsin in regard to labor relations and industrial disputes as enunciated in its statutes and the pronouncements of its Courts, including the decision here under review.

2. Wisconsin Has Enacted Comprehensive Labor Relations Statutes, Making Unnecessary a Resort to Coercion or "Trial By Combat."

As was noted by this Court in *Hotel & Restaurant E. I. Alliance v. W.E.R.B.*, 315 U.S. 437, 439-40, Wisconsin has enacted "a comprehensive code governing the relations between employers and employees in the State." The statute underlying the present controversy is a part of this comprehensive labor code. (See Appendix.) This labor policy of Wisconsin was enacted in pursuance of the wise counsel of Mr. Justice BRANDEIS, dissenting in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 448 (quoted with approval in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 500):

> "* * * All rights are derived from the purpose of the society in which they exist; above rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. *This is the function of the legislature, which, while limiting the individual and group rights of aggression and defense, may substitute the processes of justice* for the more primitive method of trial by combat." (Emphasis supplied)

For Wisconsin, too, declared it to be its public policy to substitute "processes of justice for the more primitive methods of trial by combat," while limiting "individual and group rights of aggression and defense." Sec. 111.01 (4), Wis. Stats. (1953), App. *infra*, p. 58.

Originally, Wisconsin had enacted, in 1937, the "Wisconsin Labor Relations Act,"[56] a statute patterned after the Federal Wagner Act which, in substance, regulated only employers prior to its amendment in 1947. Later, in 1939, this Act was replaced by the "Wisconsin Employment Peace Act"[57] which, as did the Labor-Management Relations Act of 1947[58] eight years later, made the regulation of labor relations a three-way street in that certain activities on the part of labor organizations were also declared to be unfair labor practices and public rights were proclaimed.

Above all, the present Wisconsin Act provides, in Sec. 111.04 (App. *infra*, p. 58), *inter alia*, that "employees shall have the right of self-organization and the right to form, join or assist labor organizations" and that such employees *"shall also have the right to refrain from any or all such activities."*[59] The Act, further, provides for a representation and election procedure (Sec. 111.05), defines employer and employee unfair labor practices which are proscribed (Sec. 111.06), and sets forth a detailed and regular procedure for the prevention of unfair labor practices (Sec. 111.07), for arbitration (Sec. 111.10), and for mediation (Sec. 111.11). Sec. 111.15 (App. *infra*.

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[56]Ch. 111, Wis. Stats. (1937), enacted by Ch. 51, Wis. Laws 1937.

[57]Ch. 111, Wis. Stats. (1953), enacted by Ch. 57, Wis. Laws 1939.

[58]29 U.S.C.A., Sec. 141 *et seq.*, enacted by Pub. L. No. 101, 80th Cong., 1st Sess.

[59]Compare Sec. 7, N.L.R.A., as amended, 29 U.S.C.A., Sec. 157.

pp. 58-60) specifically provides that the Act might not be so construed "as to invade unlawfully the right to freedom of speech.".

In short, the Wisconsin labor relations law is as comprehensive as any which may have been enacted by the several states. Wisconsin has thus expressed its judgment on striking a balance between the competing interests existing in industrial relations. "Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect." *Teamsters Union v. Hanke*, 339 U.S. 470, 475. See also *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 500 n. 4; *Teamsters Union v. Hanke, supra*, at 478; *Building Service Employees v. Gazzam*, 339 U.S. 532, 537-8; *Hotel & Restaurant E. I. Union v. W.E.R.B.*, 315 U.S. 437, 442. Since Wisconsin has provided, by Sec. 111.04, that employees shall also have the right to refuse to join labor organizations and to refuse to be represented by them in collective bargaining, there is presented here a situation exactly as existed in *Building Service Employees Union v. Gazzam, supra*, where this Court said, at 538-9:

> " * * * Under the so-enunciated public policy of Washington, it is clear that workers shall be free to join or not to join a union, and that they shall be free from the coercion, interference, or restraint of *employers of labor* in the designation of their representatives for collective bargaining. Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression from further action with like aim. To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint

of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgment by the Fourteenth Amendment."

This comprehensive labor relations act, enacted, *inter alia,* in order to guarantee employees the right to self-organization, does not, of course, deprive unions of the right or opportunity to "organize" unorganized workers, i.e., peacefully to solicit employees to become members of these unions, or to seek their representation rights. By Sec. 111.05, Wis. Stats. (1953), part of this same Act, Wisconsin has created simple and workable machinery which permits labor unions to attain representative status through free elections and by orderly proceedings devoid of coercive influences, and nothing in that Act prevents unions from soliciting unaffiliated employees by peaceful, legitimate means, not involving coercion or intimidation, or any other violation of law. By creating such machinery for the attainment of representative status, Wisconsin has substituted "the processes of justice" for the "more primitive method of trial by combat," which method Petitioners here desire to utilize.[60]

In 1939 Wisconsin had taken under advisement the experiences had by its people with other, prior labor relations policies, and decided, as did Congress in 1947, that a change was in order. The result was the enactment of the Wisconsin Employment Peace Act.[61] That Wisconsin could properly determine such a change in legislative policy cannot be doubted, for, in *Teamsters Union v. Hanke,* 339 U.S. 470, 476-7, Mr. Justice FRANKFURTER made the following observation with respect to Wisconsin's labor relations policy (quoted with approval in

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[60]See Benetar and Isaacs, "Pickets or Ballots?", 40 *A.B.A. J.* 848, 849 (1954).

[61]See Note 57, *supra.*

Brown v. Sucher, 258 Wis. 123, 127, 45 N.W. 2d 73, 75-6):

> " * * * In rejecting the claim that the restriction upon Senn's freedom was a denial of his liberty under the Fourteenth Amendment, this Court held that it lay in the domain of policy for Wisconsin to permit the picketing: 'Whether it was wise for the State to permit the unions to do so is a question of its public policy — not our concern.' 301 U.S. at 481.
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> "This conclusion was based on the Court's recognition that it was Wisconsin, not the Fourteenth Amendment, which put such picketing as a 'means of publicity on a par with advertisements in the press.' 301 U.S. at 479. If Wisconsin could permit such picketing as a matter of policy it must have been equally free as a matter of policy to choose not to permit it and therefore not to 'put this means of publicity on a par with advertisements in the press.' If Wisconsin could have deemed it wise to withdraw from the union the permission which this Court found outside the ban of the Fourteenth Amendment, such action by Washington cannot be inside that ban."

Compare *Wood v. O'Grady,* 307 N.Y. 532, 122 N.E. 2d 386, 390.

The existence of such a comprehensive labor relations policy in Wisconsin, which not only establishes standards for fair employer and union conduct, but also sets up an orderly and logical machinery for unions to obtain representative status, decisively distinguishes the instant situation from that which existed, for example, in Illinois at the time of *A.F.L. v. Swing,* 312 U.S. 321, or in Alabama at the time of *Thornhill v. Alabama,* 310 U.S. 88. These states neither possess a comprehensive labor code, nor do they, to this day, provide machinery for the orderly attainment of representation rights by unions.

There, the respective states had not substituted "the processes of justice for the more primitive method of trial by combat," as did Wisconsin.

C. The Right to Engage in a Lawful Business Free From Outside Interference is Also Constitutionally Protected.

When the Wisconsin Supreme Court handed down its second opinion, upon rehearing, it recited the following principles, among others, which, in part, had motivated it to reverse its first decision, and to which it had previously given "too little consideration" (R. 30-31):

A. Free speech is not the only right secured by the fundamental law.

B. That it must be weighed against the equally important right to engage in a legitimate business.[62]

C. That both the right to labor and the right to carry on business are liberty and property.[63]

D. That the court had left out of calculation the rule that the court is to consider not only the established facts as they appear in the record, but that it should also give attention to the inference reasonably and justifiably to be drawn therefrom.[64]

E. That in considering the right of freedom of speech, it must be recognized that the right is

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[62]Cf., *Thomas v. Collins*, 323 U.S. 516, 538; *Carpenters & Joiners v. Ritter's Cafe*, 315 U.S. 722, 725.

[63]Cf., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465; *Truax v. Corrigan*, 257 U.S. 312, 327-8, 331 ff.; *Colgate v. Harvey*, 296 U.S. 404, 430; *Meyer v. Nebraska*, 262 U.S. 390, 399; *Dorchy v. Kansas*, 272 U.S. 306, 311.

[64]Cf., *Schenk v. U.S.*, 249 U.S. 47, 52; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 495-6.

to be evaluated with the right of the many who have no interest whatsoever in the relationships between the defendant unions and those whom they seek to acquire as members.[65]

F. That by its very nature, every right is related to a duty to exercise it so as to cause a minimum of harm to another, least of all to an innocent bystander.[66]

G. That the right of freedom of speech may not be considered apart from that of society to maintain order; that one who seeks freedom may not wholly ignore his neighbor's right to it.[67]

The Wisconsin Court thus recognized that the right to engage in a business enterprise, unfettered by unlawful interference, is as much protected by the Constitution as is the right to freedom of speech.

The right to engage in a business is indeed a valuable right of property and of liberty which finds protection in the Fifth and Fourteenth Amendments to the Constitution. *Truax v. Corrigan*, 257 U.S. 312, 327-8; *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465; *Meyer v. Nebraska*, 262 U.S. 390, 399; *Colgate v. Harvey*, 296 U.S. 404, 430; *Pettibone v. U.S.*, 148 U.S. 197, 203. See also *Dorchy v. Kansas*, 272 U.S. 306, where Mr. Justice BRANDEIS stated, at 311:

> "The right to carry on business — be it called liberty or property — has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted."

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[65]Cf., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488.

[66]Cf., *Aikens v. Wisconsin*, 195 U.S. 194, 204-6.

[67]Cf., *Schenk v. U.S.*, 249 U.S. 47, 52.

Cf., *Goodwins v. Hagedorn*, 303 N.Y. 300, 305, 101 N.E. 2d 697, 699. And Respondent's right to carry on its business enjoys, moreover, the equal protection of the laws, as held in *Truax v. Corrigan*, 257 U.S. 312, 332-3:

> "The guaranty [of equal protection of the laws] was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. *It sought an equality of treatment of all persons, even though all enjoyed the protection of due process.*" (Emphasis supplied)

Rights are never absolute and independent of those of others. *Aikens v. Wisconsin*, 195 U.S. 194, 205-6. All rights must be exercised with due regard to the rights of others. The right of one person to do an act necessarily terminates at the point where it meets with another person's right that the act not be done. *Sic utere tuo ut alienum non laedas.* Cf., *Patterson v. Kentucky*, 97 U.S. 501, 505. These principles are hardly open to question, yet, their application would be completely frustrated if it were held that the picketing here could not be enjoined.

D. Changed Circumstances Require a Review of the Policy Considerations Governing the Balance of Competing Interests in Industrial Society.

Mr. Justice HOLMES pointed out many years ago that in tort law, as here,

> "* * * the ground of decision is policy; and the advantages to the community, on the one side and on the other, are the only matters really entitled to be weighed."[68]

[68] Holmes, "Privilege, Malice, and Intent," 8 *Harv. L. Rev.* 1, 9 (1894)

This truism is exemplified by the changing tenor of the decisions of this Court in picketing-free speech cases, where it was always noted that the particular expressions contained therein were restricted "to their specific context." *Teamsters Union v. Hanke*, 339 U.S. at 480 n. 6. Stripping the problem here to its very essence, this Court again is confronted with the task of making policy as to the allowable area of economic conflict between competing interests in industrial society, in the light of present-day conditions.

We have seen that organized labor, in recent years, has experienced a tremendous growth in economic power and importance. Paralleling this development, the State of Wisconsin enacted a comprehensive labor relations law in accordance with its social and economic policies developed in the light of the prevailing social and economic factors.[59] That legislative policy imposed certain inhibitions upon the conduct of employers, labor unions and employees and, above all, guaranteed employees the right to self-organization and to join unions, including the right to refrain from so doing.

Recognizing existing conditions, and abiding by this State legislative policy, the Wisconsin Supreme Court, in its second opinion upon rehearing, relied, in part, upon certain fundamental considerations (R. 30, 31) which were summarized above. (*Supra*, p. 49). These propositions emphasize that the employer, too, has certain rights of liberty and property protected by the Constitution, a view which is entirely consistent with the pronouncement of this Court that "espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause." *Giboney*

[59] See *Teamsters Union v. Hanke*, 339 U.S. at 474-5.

v. Empire Storage & Ice Co., 336 U.S. 490, 495-6; *Thomas v. Collins*, 323 U.S. 516, 538; *Carpenters & Joiners v. Ritter's Cafe*, 315 U.S. 722, 725; cf., *Truax v. Corrigan*, 257 U.S. 312, 331 ff. Indeed, other types of actionable conduct, also containing elements of communication, have never been accorded the protection of the First and Fourteenth Amendments.[70]

We have here a perfect example of the interplay of competing social and economic interests and viewpoints. On the one hand, there are petitioner labor unions led by the most powerful of all, the International Brotherhood of Teamsters, seeking to accomplish, by coercive pressure upon the employer that which they were unable to attain by peaceful persuasion through solicitation of the employees, viz, representation rights and additional membership. On the other side there is Respondent, a gravel pit and ready-mixed concrete operator whose business is so small that it does not meet the jurisdictional standards of the National Labor Relations Board, and does not, in fact, affect interstate commerce (R. 4, 6, 16,

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[70]Charles O. Gregory in "Picketing and Coercion: A Defense," 39 *Va. L. Rev.* 1053, 1056-7 (1953) notes in this regard:

> "The only reason [peaceful picketing] is at all confused with constitutionally guaranteed free speech is that it contains an element of communication. * * * But the same may be said of libel and slander or invasions of the right of privacy, as well as of fraud and blackmail. * * * And surely communications to restrain trade is in the same category. * * * Yet all these verbal manifestations may be outlawed or regulated. The elements which justify treating these communications as unlawful are what the communications *do achieve*. That I am probably correct in this feeling about peaceful picketing wins support from the way the Supreme Court has backed down on the *Thornhill* doctrine until there is precious little left of it. * * * "

17).[71] Such an employer requires, and is entitled to, the protection of the law against the intentional infliction of economic harm, which has no justification either in policy or as a means of levelling the alleged imbalance of power and influence between labor organizations on the one hand, and employers on the other. If this Court has, in the past, established a "constitutional boundary line between the competing interests" of industrial society[72] in the light of their relative power and influence at that time, such "boundary line" should be reexamined in the light of present-day facts and circumstances.

A realistic re-appraisal of the status and relative power of the actors involved in a labor controversy is necessary. Labor unions, like everyone else, must let live as well as live; yet, the substantial economic power of Petitioners was here used to compel Respondent to abide by union policy rather than State policy. Cf., *Building Service Employees v. Gazzam*, 339 U.S. 532, 540. It is submitted that this Court cannot tolerate that so reasonable a State policy should be frustrated in such manner.

E. Petitioners Ignore Reality in Asserting that the Picketing Here Was Protected as Free Speech.

No collection of epithets and metaphors culled from opinions of this Court (regardless of their relevance), as found in Petitioners' brief, can detract from the fact

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[71]Because of the principle of Federal preemption, the issue now before this Court, and the Wisconsin statute in question, would not be applicable to like activities affecting a business coming under the jurisdiction of the National Labor Relations Board. Cf., *Garner v. Teamsters Union*, 346 U.S. 485; R. 41. Thus, the decision of the Court herein will have a particular impact upon the ordinarily small business enterprises encompassed by intra-state commerce.

[72]Cf., *Hughes v. Superior Court*, 339 U.S. 464-6; *Teamsters Union v. Hanke*, 339 U.S. 470, 475; *Thornhill v. Alabama*, 310 U.S. 88, 104.

that the decision here under review must be tested in the light of all of the facts, circumstances and limitations which were considered by the Court below. (R. 35-36). "However general or loose the language of opinions, the specific situations have controlled the decision." *Hughes v. Superior Court*, 339 U.S. 460, 465. To the same effect, *Teamsters Union v. Hanke*, 339 U.S. 470, 480:

> "When an injunction of a State court comes before us it comes not as an independent collocation of words. It is defined and confined by the opinion of the State court. The injunctions * * * are to be judged here with all the limitations that are infused into their terms by the opinions of the Washington Supreme Court on the basis of which the judgments below come before us."

When a stranger union pickets, as here, after having unsuccessfully solicited workers for union membership, it inflicts, or seeks to inflict, economic harm which cannot find justification under the labor policy of Wisconsin, as embodied in the Employment Peace Act, Ch. 111, Wis. Stats. (1953). Such a union, in effect, aims to secure bargaining rights without true representative status, which lies at the bottom of Wisconsin (and Federal) labor relations policy. Petitioners thus seek to impose themselves upon Respondent's employees, as their bargaining representative, whether or not they so desire. The choice then no longer rests with the *employees*, as the law prescribes, but with the stranger union and the employer. In view of such a deliberate disregard of State labor policy, there cannot possibly be any justification for the economic harm imposed upon the employer by picketing under a claim of "free speech."

There is not present here, really, a constitutional issue of substance, for it cannot be conceived that the Four-

teenth Amendment would protect, under the guise of free speech, acts of economic coercion which have as their objective the defeat of the commendable labor policy inherent in both the Wisconsin and the Federal labor laws: That employees shall have the right to self-organization, to join or associate with labor organizations, to engage in concerted activities for bargaining and mutual protection, and that they shall also have the *right to refrain* from any or all such activities.

CONCLUSION

We submit that Petitioners' conduct here was much more than merely communication of information or peaceful persuasion. It constituted actionable "coercion or conduct otherwise unlawful or oppressive," which does not enjoy the protection of the Constitution. *Bakery Drivers Local v. Wohl,* 315 U.S. 769, 775; *Thomas v. Collins,* 323 U.S. 516, 538-9. Under the circumstances, their conduct was no different than if they had made upon the employer, audibly; a present demand for recognition. *Building Service Employees Union v. Gazzam,* 339 U.S. 532, clearly controls the decision.

We therefore respectfully request that this Court affirm the judgment of the Wisconsin Supreme Court.

Respectfully submitted,

LEON B. LAMFROM,
Counsel for Respondent.

LAMFROM & PECK,
JACOB L. BERNHEIM,

HILBERT W. DAHMS,
Of Counsel.

APPENDIX

The relevant provisions of Chapter 111 of the Wisconsin Statutes (1953) are as follows:

"111.01 **Declaration of policy.** The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this subchapter is enacted, is declared to be as follows:

"(1) It recognizes that there are three major interests involved, namely: That of the public, the employe, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

"(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers and farmer co-operatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration. It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion.

"(3) Negotiations of terms and conditions of work should result from voluntary agreement between employer and employe. For the purpose of such negotiation an employe has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source.

"(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated. While limiting individual and group rights or aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

* * *

"111.04. **Rights of employes.** Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

* * *

"111.06 **What are unfair labor practices.** (1) It shall be an unfair labor practice for an employer individually or in concert with others:

"(a). To interfere with, restrain or coerce his employes in the exercise of the rights guaranteed in section 111.04.

"(b) To initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it.

* * *

* * *

"(c) To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; * * *."

* * *

"(e) To bargain collectively with the representatives of less than a majority of his employes in a collective bargaining unit, or to enter into an all-union agreement except in the manner provided in subsection (1)(c) of this section."

* * *

"(2) It shall be an unfair labor practice for an employe individually or in concert with others:

"(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

"(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative."

* * *

"111.07 **Prevention of unfair labor practices.** (1) Any controversy concerning unfair labor practices may be submitted to the board in the manner and with the effect provided in this subchapter, *but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.*"

* * *

"111.15 **Construction of subchapter I.** Except as specifically provided in this subchapter, nothing therein shall be construed so as to interfere with or

impede or diminish in any way the right to strike or the right of individuals to work; *nor shall anything in this subchapter be so construed as to invade unlawfully the right to freedom of speech.* * * * "

* * *

(Emphasis supplied)